

been committed in respect of these goods, the car should then have been released. No question of forfeiture arises under section 127 of the Act in the circumstances. I accordingly confirm the order of the magistrate returning the car to the respondent.

*Order accordingly.*

Solicitors: *Yusof & Apandi.*

# **PUBLIC PROSECUTOR v. MOHAMMAD ABDULLAH ANG SWEE KANG**

[O. Cr. J. (N.H. Chan J.) December 15, 1986]

[Kuala Lumpur — Selangor Criminal Trial No. 59-1-1986]

*Criminal Law and Procedure — Sentence — Criminal breach of trust by managing director of Company — Plea of guilty — Penal Code, s. 409.*

In this case the accused had pleaded guilty to a charge of criminal breach of trust by an agent acting as such. The accused was the managing director of the Malayan Overseas Investment Corporation (MOIC), a joint-venture company formed to co-operate with each other for the purpose of investing overseas. One of the parties to the joint venture was MAA Holdings Sdn Bhd (MAA) which owned 13.4% of the equity of MOIC. The accused and his wife owned shares in MAA amounting to one-third of its equity. MAA also held 20% of the equity in Narspro Sdn. Bhd, (NARSPRO) a joint venture company to establish rubber manufacturing factories. NARSPRO had ordered machinery from Taiwan costing US\$220,000. They had paid a deposit of US\$66,000 and they needed to open letters of credit for the balance. However NARSPRO did not have the financial means nor credit facilities to do so. The accused then agreed to authorise MOIC's bankers to open letters of credit in the name of MOIC for the benefit of NARSPRO. When the machinery arrived in Penang, NARSPRO did not have the money. The letters of credit had been opened in the name of MOIC and the accused instructed a sum of \$338,808.80 to be paid by the bankers of MOIC. The payment was not made for the benefit of MOIC and it was made without the knowledge or approval of the Board of Directors of MOIC. The amount of \$338,808.80 together with bank interest had since been repaid to MOIC by NARSPRO.

**Held:** (1) any judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this type of case: the retributive factor in order to show the court's disapproval or abhorrence on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders;

(2) in breach of trust cases a term of immediate imprisonment is inevitable save in any exceptional circumstances or where the amount of money obtained is small. The sentencing court should impose a sufficiently substantial

A term of imprisonment to mark publicly the gravity of the offence;

(3) in this case after considering all the matters in the case and after having given the appropriate discount for the plea of guilty the court sentenced the accused to eight years' imprisonment plus a fine of \$100,000 in default a further 6 months' imprisonment.

B

[Editorial Note: On appeal to the Supreme Court (May 18, 1987) the jail sentence was reduced to 4 years, and the fine imposed on the accused was set aside.]

*Cases referred to:*

C

- (1) *Reg. v. Davies* (1978) 67 Cr. App. R. 207, 210.
- (2) *Reg. v. Sargeant* (1974) 60 Cr. App. R. 74, 77.
- (3) *Reg. v. Barrick* (1985) 81 Cr. App. R. 78, 81-82.
- (4) *Reg. v. Pugh and Rendell* [1981] Cr. L.R. 270, 271.
- (5) *Public Prosecutor v. Khairuddin* [1982] 1 M.L.J. 331, 332.

D

- (6) *Public Prosecutor v. Muthu Lingam* [1986] 1 M.L.J. 432.

## **CRIMINAL TRIAL.**

*Mohtar Abdullah* (Deputy Public Prosecutor) (*Tan Hock Chuan* (Deputy Public Prosecutor) with him) for the Public Prosecutor.

E

*Jeffrey Fernandez* (*Dulip Singh* with him) for the accused.

*Cur. Adv. Vult.*

F

**N.H. Chan J.:** What is the right sentencing policy for criminal breach of trust? "A good deal depends upon the concept of what is necessary. There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. In our judgment two of those factors operate in a case of this kind." - said Lawton L.J.

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in the Court of Appeal in *Reg. v. Davies*.<sup>(1)</sup> The two factors which operate in this class of case are retribution and deterrence. In *Davies* it was held that where a solicitor in breach of trust uses clients' money to bolster-up other business interests, in considering the appropriate sentence, both the retributive and deterrent elements have to be considered.

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The retributive element is an important one in this class of case. "At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct." — by

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Lawton L.J. in *Davies*, at p. 210. "The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass." — by Lawton L.J. in *Reg. v. Sargeant*<sup>(2)</sup>

The next aspect of the matter is the deterrent element. It is said, and rightly said, that when a person is minded to commit criminal breach of trust he is not likely to be deterred by the fact that he may get five years rather than three years or six years rather than four years. "That is right, but what has got to be maintained is this; be they cashiers, milk roundsmen, foremen or solicitors if they are in breach of trust they will be punished and punished very severely . . . Therefore it must be made clear that anyone breaking trust must expect a severe sentence." — by Lawton L.J. in *Davies* at p. 210. Likely offenders may very well be put off by deterrent sentences. So that as far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences may very well be of considerable value where crime is premeditated. This is what Lawton L.J. said in *Sargeant*, at p.77:

"There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do not want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated."

Persons in positions of trust who are thinking of abusing that trust by making away with other people's money may very well be put off by deterrent sentences.

Any judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this kind of case; the retributive factor in order to show the courts' disapproval or abhorrence, on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders.

In breach of trust cases a term of immediate

A imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. The sentencing court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence; see *Reg. v. Barrick*<sup>(3)</sup> at pp. 81, 82. The Court of Appeal in *Reg. v. Pugh and Rendell*<sup>(4)</sup> has pointed out that "dishonesty by persons in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business." And in *Public Prosecutor v. Khairuddin*<sup>(5)</sup> Mohamed Azmi J. has this to say:

"The number of people placed in position[s] of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means.

D . . . Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till."

In *Barrick*, (*supra*) the Lord Chief Justice gave the following guidelines on the proper level of sentence to be imposed in breach of trust cases in the United Kingdom. He said, at p. 82:

F "The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amounts involved cannot be described as small but are less than £10,000 or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate (see for example *Weston* (1980) 2 Cr. App. R. (S) 391). Cases involving sums of between about £10,000 and £50,000 will merit a term of about 2 to 3 years' imprisonment. Where greater sums are involved, for example those over £100,000, then a term of 3½ years to 4½ years would be justified (see for example the case of *Strubell* (1982) 4 Cr. App. R. (S) 300)."

H In *Khairuddin*, (*supra*) the amount involved on the CBT Charge under section 408 of the Penal Code was \$20,000 and Mohamed Azmi J. substituted a sentence of 18 months' imprisonment for the day's imprisonment imposed at the trial in addition to the fine of \$2,000. In *Public Prosecutor v. Muthu Lingam*<sup>(6)</sup> the amount involved was \$100,000. A sentence of 3 years' imprisonment was substituted for the 1 day imposed at trial in addition to the fine of \$3,000 for criminal breach of trust under section 409 Penal Code.

If this Court is to follow the trend set by these

two cases (*Khairuddin* and *Muthu Lingam*) on the proper sentence to be passed in breach of trust cases which seems, albeit coincidentally, to be in line with the guidelines which have been given in the English case of *Barrick*, then, a term of 3½ to 4½ years would appear to be justified in the present case where the amount involved is \$338,808.80. But then United Kingdom law is not nearly the same as local law in breach of trust cases.

In the United Kingdom, in breach of trust cases there is no proper basis for distinguishing between them upon the offender's occupation. Professional men should expect to be punished as the others: see *Barrick*,<sup>(3)</sup> *supra*. On the other hand in this country how an accused person would have fared would depend on his occupation. Anyone who commits criminal breach of trust can be punished with imprisonment for up to 3 years, or with fine, or with both: section 406 Penal Code. But if he commits the offence as a carrier, wharfinger or warehouse-keeper acting as such, he can be imprisoned for up to 7 years plus liability to a fine: section 407. If it is committed by a clerk or servant acting as such he can be imprisoned for up to 7 years plus fine: section 408. If breaking trust is by a public servant, or by a banker, merchant, factor, broker, attorney or agent acting as such in the way of his business, he can be imprisoned up to a maximum of 20 years plus fine: section 409.

In this country, in breach of trust cases the gravity of the crime depends on the occupation of the offender. The most serious offence is section 409 and the punishment for it is also the most severe. That this is so is because, in the eye of the law, no criminal could be in greater breach of trust than a public servant, or a banker, merchant, factor, broker, attorney or agent acting as such.

In *Barrick*, the total amount of the defalcations involved was £9,000 and the maximum sentence for the offences for which he was charged was 10 years. He received concurrent sentences of 2 years which were held, on appeal, to be not excessive. In *Davies*, the total amount involved in the defalcations amounted to £260,000 and the maximum sentence that could be imposed was 7 years. His sentence of 4 years' imprisonment was confirmed on appeal. But in this country for the offence under section 409 of the Penal Code the maximum sentence is 20 years.

Although sections 407, 408 and 409 of the Penal Code provide the basis for distinguishing between the sections upon the offender's occupa-

tion, and United Kingdom law does not in breach of trust cases, there seems to be some compatibility (section 409 excepted) with regard to the maximum sentence that could be imposed between the United Kingdom and local legislation. In the light of these considerations it seems to this Court that the *Barrick* guidelines on the proper level of sentence to be imposed are useful to local sentencing courts for offences under sections 406, 407 and 408 of the Penal Code as the maximum length of the sentence of imprisonment which could be imposed in those sections is more or less equivalent to the maximum sentence in the United Kingdom provisions.

In the case of a section 409 offence, however, since the crime is considered by the legislature as very grave criminal conduct, the punishment, in order to fit the crime, is made especially severe — 20 years as the maximum term of imprisonment. The maximum punishment for this offence is twice the length of the maximum of the harshest United Kingdom punishment in breach of trust cases. Nonetheless, the *Barrick* guidelines are still useful but with this additional stipulation or rider in mind — that the length of the terms of imprisonment recommended in the guidelines be made twice as long. In view of these considerations and with the benefit of hindsight, it seems to this Court that the sentence imposed by me in *Muthu Lingam* (*supra*) to which I have referred in this judgment was too lenient.

I turn now to the instant case.

The accused, Mohammad Abdullah Ang Swee Kang, pleaded guilty to a charge of criminal breach of trust by an agent acting as such. The offence carries a maximum punishment of 20 years' imprisonment plus liability to a fine. The charge reads:

"That you on the 9th day of April, 1985 at No. 91, Jalan SS21/1A, Damansara Utama, Petaling Jaya, in the State of Selangor, being an agent of Malaysia Overseas Investment Corporation Sdn. Bhd. to wit, the Managing Director and in such capacity entrusted with dominion over certain property, to wit, M\$338,808.80, committed criminal breach of trust in respect of the said property and you thereby committed an offence punishable under section 409 of the Penal Code."

Malaysia Overseas Investment Corporation (MOIC) was incorporated on April 28, 1983. It was the result of a joint venture agreement between nine parties. MOIC is a company formed to "co-operate with each other (the nine investing partners of the joint venture) for the purpose of investing

overseas, expanding or furthering Malaysian international trade, and to function as a body for trade and investment purposes." One of the parties to the joint venture was MAA Holdings Sdn. Bhd. (MAA). This company owns 666,670 shares in MOIC which represents 13.4% of the equity of MOIC. The accused and his wife own 163,502 shares in MAA which amount to one-third of the equity of MAA. The accused is a director of MAA at all material times.

Since the formation of MOIC the accused had been its managing director until his resignation on September 11, 1985. As its managing director the accused had full management and financial control of the company. He was entrusted with dominion over money belonging to MOIC including those in the various bank accounts operated by MOIC.

There was also a company known as NARSPRO Sdn. Bhd. (NARSPRO) which is a joint venture company to establish rubber manufacturing factories in the district of Kubang Pasu, Kedah. MAA, of which the accused and his wife have an interest, holds 20% of the equity in NARSPRO.

NARSPRO had ordered certain machinery from Taiwan costing US\$220,000. They have paid a deposit of US\$66,000 and they needed to open letters of credit for the balance sum. However, NARSPRO did not have the financial means nor credit facilities to do so. The accused then agreed to authorise MOIC's bankers to open letters of credit in the name of MOIC for the benefit of NARSPRO. (According to the accused in his mitigation plea, an approach was made to him for assistance from the joint managing director of NARSPRO, Raja Mohamed at the behest of the Prime Minister).

When the machinery arrived in Penang on March 25, 1985, NARSPRO did not have the money. But the letters of credit had been opened in the name of MOIC. According to the defence, it was at this crucial time that the accused made the decision to get MOIC to negotiate the letters of credit. On his instruction, a sum of \$338,808.80 was paid out by the bankers of MOIC on April 9, 1985.

The payment was not made for the benefit of MOIC and it was made without the knowledge nor approval of the Board of Directors of MOIC.

NARSPRO, for whom the money was paid for its benefit, had by May 2, 1986, paid to MOIC the

A sum of \$333,808.80 together with bank interest.

Mr Fernandez has said that there was no loss suffered by MOIC because it had got its money back. But that is not the point. This is not a view which this Court can accept. The point is that the accused had made use of the money of MOIC as if it was his own. He had used it to assist NARSPRO as to which MOIC had no interests or connections. The courts have to mark publicly the gravity of the crime and the sooner company directors realise that the funds of their companies are not theirs to spend or disburse as their own the better it is for the economic well-being of the country.

It has also been urged upon this Court that a conviction is a shattering experience for a man of his position and standing in society. His counsel said that the accused was a man who rose from humble beginnings to great heights in the business world. He had also contributed much to helping others. He has now lost his standing in society and in the business world. All I can say is that he has brought all this on himself.

As was said in *Barrick*, at p. 81, a person who commits breach of trust, "will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family." That passage points accurately to the type of case with which the courts normally are concerned whenever a person is charged with criminal breach of trust. In almost all cases the accused is a first offender. It was also the type of case with which the Court of Appeal were concerned when they gave their guidelines in *Barrick*.

I am also mindful of the fact that the accused had pleaded guilty. In *Barrick*, the Lord Chief Justice has this to say, at p. 82:

"The [prison] terms suggested [in the guidelines] are appropriate where the case is contested. In any case where a plea of guilty is entered however the Court should give the appropriate discount."

I have looked carefully at his mitigation and I have borne in mind all the points Mr Fernandez has made. After having anxiously considered all matters in the case and after having given the appropriate discount for his plea of guilty I must now pronounce the appropriate sentence. I have to pass a

sufficiently substantial term of imprisonment to mark publicly the gravity of the crime. No criminal could be in greater breach of trust than a company director acting as such in the way of his business.

I sentence the accused to eight years' imprisonment plus a fine of \$100,000 in default of which there will be imprisonment for a further 6 months, the sentence to begin with effect from December 12, 1986.

*Convicted and sentenced accordingly.*

Solicitor: *Dulip Singh & Co.*

## PUBLIC PROSECUTOR v. TEE AN CHUAN

[O. Cr. J. (N.H. Chan J.) December 22, 1986]

[Kuala Lumpur — Federal Territory Criminal Trial No. 59-3-86]

*Criminal Law and Procedure — Sentence — Criminal breach of trust as agent — Plea of guilty — Penal Code s. 409.*

In this case the accused pleaded guilty to a charge of criminal breach of trust by an agent, to wit, as Chairman of Koperasi Belia Bersatu Berhad. The Koperasi Belia Bersatu Berhad (KOSATU) was founded by the accused and the accused was in control of the management and had dominion over all money collected. The accused was also a director and major shareholder of Tee Holdings Sdn. Bhd. Tee Holdings entered into an agreement to buy a piece of land for \$3,500,000 and part of the purchase was paid from the funds of KOSATU. The accused also entered into an agreement with Mount Pleasure Corporation Bhd. to buy an apartment in Penang and again part of the purchase price was paid out of the funds of KOSATU. The accused had no authority to use the funds. The accused was entrusted in his capacity as Chairman with dominion over the total sum of \$603,700 belonging to KOSATU and he had dishonestly converted the money to his own use.

**Held:** having taken all factors into account, the appropriate sentence in this case is imprisonment for 12 years and a fine of \$50,000 or in default a further 6 months' imprisonment. The sentence is meant to be punitive. It is meant to reflect the Court's abhorrence of this type of mean criminal conduct. It is a sentence passed in the interest of the public. It is also meant to deter others who are minded to embark on so mean a crime.

### A Cases referred to:

- (1) *Public Prosecutor v. Mohammad Abdullah Ang Swee Kang* [1987] 2 M.L.J. 368.
- (2) *R. v. Barrick* (1985) 81 Cr. App. R. 78.
- (3) *Lim Kee Butt v. Public Prosecutor* [1953] M.L.J. 209.
- (4) *Koh Sang Wah v. Public Prosecutor* [1966] 1 M.L.J. 12.
- (5) *Public Prosecutor v. Khairuddin* [1982] 1 M.L.J. 331.
- (6) *Wickrasooriya v. Public Prosecutor* [1964] M.L.J. 281.
- (7) *Mohamad Adil v. Public Prosecutor* [1967] 1 M.L.J. 151.
- (8) *Shanmuganathan v. Public Prosecutor* [1967] 1 M.L.J. 204.
- (9) *Dato Harun v. Public Prosecutor* [1978] 1 M.L.J. 240.
- (10) *Yanasengam v. Public Prosecutor* [1978] 1 M.L.J. 269.
- (11) *Public Prosecutor v. Tan Sri Tan Hian Tsin* F.T. Criminal Trial No. 38/76, unreported.
- (12) *Tan Sri Tan Hian Tsin v. Public Prosecutor* [1979] 1 M.L.J. 73 F.C.
- (13) *Public Prosecutor v. Muthu Lingam* [1986] 1 M.L.J. 432.
- (14) *Lee Yew Siong v. Public Prosecutor* [1973] 1 M.L.J. 37.
- (15) *Abdul Kadir v. Public Prosecutor* [1984] 1 M.L.J. 80.
- (16) *Reg. v. Davies* (1978) 67 Cr. App. R. 207, 209.

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### CRIMINAL TRIAL.

*Mohtar Abdullah* (Deputy Public Prosecutor)  
(*Tan Hock Chuan*) Deputy Public Prosecutor (with him) for the Public Prosecutor.

*Ronald Khoo* for the accused.

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*Cur. Adv. Vult.*

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N.H. Chan J.: Much of what I have said in *Public Prosecutor v. Mohammad Abdullah Ang Swee Kang*,<sup>(1)</sup> last week on the principles and policy of sentencing in breach of trust cases apply as much to this case. Any judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this kind of case. They are:

the *retributive factor* — to show the courts' disapproval or abhorrence, on behalf of society, of this type of criminal conduct, and

the *deterrent factor* — to discourage likely offenders.

I have also in *Mohammad Abdullah Ang Swee Kang* generally approved and adopted the guidelines given by the English Court of Appeal in *Reg. v. Barrick*<sup>(2)</sup> on the proper level of sentence to be imposed in breach of trust cases. The guidelines are summarised in the headnote, thus (at p. 79):

"In these cases in general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. The Court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. Where amounts involved are less than £10,000 terms of imprisonment ranging from the very short up to 18 months are appropriate. Cases involving sums between £10,000 and £50,000 will merit a term of about 2 or 3 years' imprisonment. Where greater sums are involved, e.g. over £100,000, then a term of 3½ to 4½ years' imprisonment would be justified."

I am driven to conclude that the *Barrick* guidelines provided a useful guide to local sentencing courts because Malaysian case law on the sentences that have been passed in breach of trust cases (excepting those on section 409 offences) appears to be in line with the recommendations suggested in the guidelines. One only has to take a look at the three categories in the guidelines and at the respective contemporary Malaysian cases which I have adumbrated below to know this (section 409 cases have been excluded from this comparison):

(i) *Where the amounts involved are less than £10,000 – Prison terms ranging from the very short up to 18 months are appropriate.*

The Malaysian cases are: *Lim Kee Butt v. Public Prosecutor*<sup>(3)</sup> (where the amount involved was \$70; 1 month plus \$100 fine) (section 406). *Koh Seng Wah v. Public Prosecutor*<sup>(3)</sup> (where the amount \$18,000; 1 year's imprisonment) (section 408). *Public Prosecutor v. Khairuddin*<sup>(5)</sup> (where the sum was \$20,000; 18 months' imprisonment) (section 408).

In the light of these considerations and with the benefit of hindsight, it seems to me that the sentence imposed by the court in *Wickrasooriya v. Public Prosecutor*<sup>(6)</sup> (where the sums were \$39.70 and \$12.00 (section 408); 3 years' imprisonment) was excessive and in *Mohamed Adil v. Public Prosecutor*<sup>(7)</sup> (where the amount obtained, \$1,457.50, was not small especially in those days (section 406); 3 months' imprisonment reduced to \$500 fine) was too lenient. As for *Shanmuganathan v. Public Prosecutor*<sup>(8)</sup> it can be put as a case where the amount of money obtained was small; the amount stated in the charge was \$150 (section 408).

(ii) *Cases involving sums between £10,000 and £50,000 – merited a term of about 2 or 3 years' imprisonment.* There appears to be no section 406, 407 or 408 reported Malaysian case in this category.

(iii) *Where greater sums are involved, e.g. over £100,000 – a term of 3½ to 4½ years' imprisonment is justified.* The only reported Malaysian case under this category (section 409 excluded) is: *Dato Harun v. Public Prosecutor*<sup>(9)</sup> (where 3 million ordinary shares and \$1 million Debenture Stocks were involved; the first and second appellants were sentenced to 3 years' imprisonment and, the third appellant was fined \$10,000 due to exceptional circumstances) (section 406). 3 years is the maximum under section 406.

I wrote in *Mohammad Abdullah Ang Swee Kang*, thus: (at pp. 8, 9):

"... there seems to be some compatibility (section 409 excepted) with regard to the maximum sentence that could be imposed between the United Kingdom and local legislation. In the light of these considerations it seems to this Court that the *Barrick* guidelines on the proper level of sentence to be imposed are useful to local sentencing courts for offences under sections 406, 407 and 408 of the Penal Code as the maximum length of the sentence of imprisonment which could be imposed in those sections is more or less equivalent to the maximum sentence in the United Kingdom provisions."

On the other hand, the punishment for an offence under section 409 of the Penal Code had always been very severe. The crime is considered by the legislature as very grave criminal conduct and the punishment, in order to fit the crime, is made especially severe. It used to be "imprisonment for life, or . . . imprisonment for a term which may extend to ten years" but it is now "imprisonment for a term which may extend to twenty years": see Penal Code (Amendment and Extension) Act, 1975; the amendment took effect from March 31, 1976. The explanatory statement to the Bill (which is reproduced in *Yanasengam v. Public Prosecutor*<sup>(10)</sup>) says:

"... these amendments are for the purpose of removing a curious anomaly created by an amendment to the Code by the Criminal Justice Ordinance, 1953, which abolished penal servitude. Penal servitude was a custodial sentence with different attributes from imprisonment. In the result, those sections of the Code providing the punishment of penal servitude for life were amended to read 'imprisonment for life'. Another section of the Ordinance provided that a sentence of imprisonment for life should be deemed for all purposes to be a sentence of imprisonment for 20 years. Before the 1953 amendment, many sections creating the more serious offences presented the Court with the alternative of 'penal servitude for life or imprisonment for a term which may extend to 10 years'. The amendment created a situation in which the maximum sentence under these sections, although expressed to be 'for life' was 20 years, to which there was an alternative sentence not exceeding 10 years. The Federal Court discovered the lacuna, and held

that while a court could impose a sentence of 20 years it could not pass any sentence of between 10 and 20 years. To overcome this difficulty it is proposed to make 20 years the maximum prison sentence which can be passed for offences at present punishable with imprisonment for life, and to delete all reference to alternative sentences of imprisonment . . . ”

As I have said in *Mohammad Abdullah Ang Swee Kang*, “the maximum punishment for [a section 409] offence is twice the length of the maximum of the harshest of the United Kingdom punishment in breach of trust cases. Nonetheless, the *Barrick* guidelines are still useful but with this additional stipulation or rider in mind – that the length of the terms of imprisonment recommended in the guidelines be made twice as long.” Ang was given 8 years and fined \$100,000. The amount involved was \$338,808.80 which would place it under the third category of the guidelines. By doubling the length of the suggested prison term for that category in the *Barrick* guidelines the sentence that was passed in Ang’s case was justified; it being a section 409 offence.

In *Public Prosecutor v. Tan Sri Tan Hian Tsin*<sup>(11)</sup> (an appeal to the Federal Court against conviction was rejected: see *Tan Sri Tan Hian Tsin v. Public Prosecutor*<sup>(12)</sup>), the amount involved was \$200,000. Harun J. sentenced him to 5 years’ imprisonment for criminal breach of trust under section 409 of the Penal Code. Actually, if one were to apply and act under the second category of the *Barrick* guidelines, this would have merited only a term of about 2 or 3 years’ imprisonment. But in view of the considerations which I have referred to in the previous paragraph the sentence that was imposed in that case would appear to be justified. This can be seen to have been achieved by adapting the guidelines to the local situation – namely, for offences under section 409 – by doubling the length of imprisonment suggested in the guidelines.

On the other hand, in the light of the foregoing considerations and with the benefit of hindsight, it seems to me that the sentences passed by me in *Public Prosecutor v. Muthu Lingam*<sup>(13)</sup> (\$100,000 (section 409); 3 years’ imprisonment) – which is a case under the second category as it has been adjusted for section 409 – and by Abdul Hamid J. in *Lee Yew Siong v. Public Prosecutor*<sup>(14)</sup> (\$25,000 (section 409); 2 months’ imprisonment and \$2,000 fine) – which falls under the first category as it has been adapted for section 409 – were too lenient. But the sentence of 3 days’ jail

A and a fine of \$5,000 passed in *Abdul Kadir v. Public Prosecutor*<sup>(15)</sup> for an offence under section 409 was justified as the amount obtained was small; it was only \$200.

B I now turn to the instant case. The following are taken from the facts which have been tendered and which were admitted by the accused.

C Koperasi Belia Bersatu Berhad (KOSATU) was founded by the accused Tee An Chuan in 1976. Tee was its chairman until his resignation in July 1986.

Tee was also a director and a major shareholder of Tee Holdings Sdn Bhd; Tee owns 730,999 shares and his wife, Wong Mook Yin, owns 1 share.

D The money collected by the various branches of KOSATU was taken to its head office at No. 594, 596 Jalan Pudu, Kuala Lumpur where it was put into its bank account with the Jalan Pudu branch of United Malayan Banking Corporation (UMBC). In order to operate the bank account, cheques have to be signed by two out of the three authorised signatories, who were Tee, Lee Ba @ Lee Yong Shuang who is KOSATU’s treasurer, and Chang Siew Kai the secretary of KOSATU.

E Tee was in control of the management of KOSATU including dominion over all money collected. It was the practice of the Co-operative to have blank cheques signed beforehand by either Lee Ba or Chang Siew Kai leaving Tee as the ultimate signatory. Also, KOSATU’s Executive Committee (EXCO) which was established to exercise the function of the board of directors did not convene any meetings. Instead, Tee made decisions on his own. He would then have the minutes, which were prepared by him, of the meetings which never took place signed by the members of KOSATU’s EXCO.

H On April 23, 1986, Tee Holdings signed an agreement with Tan Sri S.O.K. Ubaidulla to buy a piece of land at Sungei Serdang, Kuala Lumpur for \$3,500,000. According to the terms of the contract Tee Holdings was to pay an initial sum of \$700,000. Tee Holdings, through the accused, issued a cheque for this amount on April 23, 1985, but the cheque was not cleared until May 3, 1985.

I On May 3, 1985, on the instruction of the accused a cheque was made out for the sum of \$510,000 from KOSATU’s account with UMBC. Jalan Pudu Branch. The cheque was cashed on the

same day. Using an application form for a cashier's cheque signed by the accused, the said money was in turn used to purchase a UMBC cashier's cheque No. 006217 dated May 3, 1985, for \$510,000 in favour of Tee Holdings. This cheque was banked into the account of Tee Holdings with the Perwira Habib Bank at Petaling Jaya.

Tee Holdings was also supposed to pay the balance of \$2,800,000 within 60 days. However, the dateline for the payment of the balance was extended to July 31, 1985, on the condition that Tee Holdings pay \$65,350 compensation to Tan Sri Ubaidulla for the delay.

On the instruction of the accused a cheque for \$65,350 was issued by KOSATU out of its account with UMBC on July 26, 1985. The cheque was cashed on the same day. Using an application form for a cashier's cheque signed by the accused, the said money was in turn used to purchase a UMBC cashier's cheque No. 006561 dated July 26, 1985, for \$65,350 in favour of Tan Sri Ubaidulla and subsequently it was paid into Tan Sri Ubaidulla's account.

On June 25, 1985, the accused entered into an agreement with Mount Pleasure Corporation Sdn. Bhd. to buy an apartment which was described as Unit 1, 16th Floor, Block 8, Reefs Apartment, Penang for \$567,000.

On August 31, 1986, the accused had paid \$85,050 (i.e. 15% of the purchase price) out of which \$28,350 was paid with a UMBC cashier's cheque No. 007002 dated October 26, 1985.

This \$28,350 was part of a UMBC cash cheque dated October 24, 1985, for \$30,000 drawn on KOSATU's account with UMBC on the instruction of the accused. The cheque was cashed on the same day. Using an application form for a cashier's cheque signed by the accused, a UMBC cashier's cheque No. 007002 for \$28,350 dated October 26, 1985 was purchased in favour of Mount Pleasure Corporation Sdn Bhd and banked into its account.

From these facts it is plain that the accused was clearly entrusted, in his capacity as chairman, with dominion over the total sum of \$603,700 belonging to KOSATU. He had dishonestly converted this money to his own use.

On November 12, 1986, the accused, Tee An Chuan was charged in this Court for an offence

A punishable under section 409 of the Penal Code. The charge reads:

"That you between the 2nd day of May 1985 and the 27th day of October 1985 at No. 594/596, Jalan Pudu, in the Federal Territory of Kuala Lumpur, being an agent of Koperasi Belia Bersatu Berhad, to wit, the Chairman and in such capacity entrusted with dominion over certain property, to wit, \$603,700, committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 409 of the Penal Code."

To this charge he pleaded guilty.

C It has been urged on his behalf by Mr. Ronald Khoo that he had expressed an intention right from the beginning to plead guilty and that he had co-operated with the investigations. In answer to this submission, I think this passage from the judgment of Lawton L.J. in *Reg. v. Davies*<sup>(16)</sup> is apposite. This is what he said:

"The appellant pleaded guilty at the trial. It was said on his behalf that if he had not pleaded guilty the trial would have been a long drawn out one, that the public would have been put to great expense because of a long trial and the appellant, by his plea, saved the public a great deal of money. He did: but one of the problems we have to look at is to decide to what extent his plea of guilty should lead to a lower sentence than his actual defalcations called for. It is not to be overlooked that he did co-operate and pleaded guilty. On the other hand this was the kind of offence where, once the accountants had investigated the financial affairs of this firm ... there really was not much more the appellant could do but plead guilty."

... We bear in mind that on some of the counts it would have been possible to put up some kind of bogus defence, but in the majority of cases once the defalcations had been discovered a plea of guilty was inevitable."

G Mr. Khoo has also urged on his behalf that he had done a lot for the young people of this country. In 1975, he founded Pertubuhan Belia Bersatu. It is the second largest youth organisation in the country. He was its first president and he still is. He was vice-president and later between 1984 and 1986 became president of the Malaysian Youth Council. In 1983, he was appointed treasurer of the World Assembly of Youth. He had by his foolishness forfeited all the good work he had done in the youth movement both internationally and locally. He has brought shame and disgrace upon himself and his family. He is mindful of the fact that his family will have to put up with the scorn and contempt of neighbours and friends. He has ruined himself. He is 42 years old. In my view, he had, however, brought these troubles upon himself. They were troubles arising from what he had done. As for the plight and disgrace which his defalcations

have brought on his family, once again, I have to remind myself that these consequences arise from his own criminal misconduct. "We have had to say in this Court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take into consideration by way of reducing sentence." — by Lawton L. J. in *Davies (supra)*, at p. 209.

But what about the misery and hardship, this man and those of his kind have brought to the poor who have lost everything. He had used his position of trust to make away with other people's money. The money was stolen from poor people who could ill-afford the loss. In short, this is a mean offence. And the criminals who indulge in this sort of crime are as mean as they could have been.

I quote below some excerpts from the article "Without Fear or Favour" by Tan Sri Dr Tan Chee Khoon in *The Star* newspaper of December 17, 1986, so as to give an idea of the size of the problem:

"The co-operative scandal is very serious as it involves a total deposit of about \$1.5 billion, 588,000 members and 630 branches. There must be hundreds of thousands of families who are now regretting the day that they put their money in the 24 deposit-taking co-operatives.

The problems in the co-operatives first surfaced in early July when payments were suspended by KOSATU. The run on KOSATU followed and on August 8, the activities of the 24 co-operatives were suspended and the assets of 136 of their directors and principal office bearers were frozen. They were also required to surrender their passports.

Seventeen accounting firms appointed to assist in the investigation which revealed gross and widespread mismanagement of funds, fraud, conflict of interest and improper handling of funds.

KOSATU was founded in January 1977 by Tee Ah Chuan, and by August 8, 1986, it had 67 branches and 14,541 members scattered through[out] Peninsular Malaysia. By July 1986, its deposits totalled about \$156.1 million collected from about 52,000 depositors.

Most of the depositors are the poor who live in new villages who now see their small life time savings go up in smoke.

In a scandal of this magnitude many tragedies have already occurred. There are cases of suicide among the depositors and employees of the co-operatives.

The human suffering among the hundreds of thousands must be very great."

I must now pronounce the appropriate sentence. Before doing so, I wish to pay regard to this passage in the judgment in *Barrick, supra*, at p. 82:

- A "The following are some of the matters to which the Court will no doubt wish to pay regard in determining what the proper level of sentence should be: (i) the quality and degree of trust reposed in the offender including his rank; (ii) the period over which the fraud or the thefts have been perpetrated; (iii) the use to which the money or property dishonestly taken was put; (iv) the effect upon the victim; (v) the impact of the offences on the public and public confidence; (vi) the effect on fellow-employees or partners; (vii) the effect on the offender himself; (viii) his own history; (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where, as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police."
- B
- C

- Although the sum involved may in many cases provide a useful guide, it is obviously not the only factor to be considered: see *Barrick*, at p. 82. In the instant case there are other factors to be considered. The following are some of the matters to which this Court will have to pay regard in determining what the proper level of sentence should be. In this case, we have the chairman of a cooperative who whilst in a position of trust, abused that trust to the extent that a large amount of money was taken and used for his own purposes. The money was taken from the very poor; individuals who could ill-afford the loss. By anybody's standards that was very grave criminal conduct. This offence, in short, is a mean offence. It is as mean as it could have been.
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- E
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- The money dishonestly taken was used by the accused for his own benefit. The effect of the defalcations on the victims, who are the depositors, is disastrous — never was there so much human suffering among so many poor individuals. It is certainly no consolation at all to tell the thousands of afflicted depositors that they could bring legal proceedings to recover the money that they have lost. Yet this tenuous course was advanced in *Lee Yew Siong v. Public Prosecutor (supra)*.<sup>\*</sup> This is what the judge said (p. 37): "As for the loss suffer-
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<sup>\*</sup>The court, in that case, set aside the sentence of 3 years' imprisonment on an advocate and solicitor for an offence under section 409 where the sum involved was \$25,000 and substituted a short sentence of imprisonment (2 months) and a fine of \$2,000. In his judgment, Abdul Hamid J. said, at p. 37, "The appellant was an advocate and solicitor . . . I do not for a moment suggest that this serious offence for which he was convicted should be viewed less seriously just because he was an advocate and solicitor. However, the court cannot ignore the fact that he will face disciplinary proceedings and the high possibility that he will be struck off the roll of advocates and solicitors."

I

ed by the complainant, he is at liberty to institute civil proceedings to recover the sum in respect of which the appellant dishonestly misappropriated."

I must also not forget the impact this type of crime has on the public and public confidence.

I have taken all factors into account including his mitigation plea which was urged so ably on his behalf by counsel. I have also carefully and anxiously considered all the other matters that could be put in his favour and after taking into account his guilty plea (but there really was not much more he could do but to plead guilty once the defalcations had been discovered) and the fact that he is a first offender (but then in almost every case of breach of trust the accused is a first offender), I have now to pass an appropriate sentence. Despite the great punishment that offenders of this sort bring upon themselves, this Court must, nevertheless, pass a sufficiently substantial term of imprisonment to mark publicly the gravity of this mean offence.

In my judgment, the appropriate sentence for this mean offence is imprisonment for 12 years and a fine of \$50,000 in default of which there will be imprisonment for a further six months. The imprisonment is to take effect from December 12, 1986. The sentence is meant to be punitive. It is meant to reflect this Court's abhorrence of this type of mean criminal conduct. It is a sentence passed in the

The judge went on to say (pp. 37, 38): "The magistrate also observed that the appellant knew the consequences of his misappropriating someone else's money. That is true. The appellant himself had admitted his foolishness, nonetheless *the court should also consider other penalties he has to suffer consequent upon his conviction*. The stigma of the conviction for an offence such as this and of being struck off the roll will have to be borne by him for the rest of his life." (emphasis supplied)

Compare this with the way in which Lawton L.J. dealt with a similar situation: see *Davies (supra)*, at pp. 208, 209:

"As a result of what the Law Society's accountants found the appellant was summoned before the Disciplinary Committee of the Law Society and, as was inevitable, he was struck off the Roll of Solicitors. That was in June 1975. He was a ruined man. He was then aged 54. He could not practise his profession and, until such time as the Law Society gave him leave to do so — and it was unlikely that they would for a very long time — he could not even work as a solicitors' clerk. He had, however, brought these troubles upon himself. They were troubles arising from what he had done."

A interest of the public. It is also meant to deter others who are minded to embark on so mean a crime.

*Convicted and sentenced accordingly.*

B Solicitors: *Shearn Delamore & Co.*

C **HONG LEONG FINANCE BHD. v. HON HOI WENG & ORS.**

[O.C.J. (V.C. George J.) January 16, 1987]

[Kuala Lumpur — Civil Suit No. C 294 of 1983]

D *Practice and Procedure — Stay pending appeal — Whether application allowed — Distinction drawn between matter decided after full trial and one summarily decided.*

E The cause of action the plaintiffs had against the fourth defendant appears to be that the fourth defendant had agreed to indemnify the plaintiffs in respect of loss they may suffer as a result of the plaintiffs entering into a hire-purchase agreement in respect of a certain machine with the first and second defendants. The third defendants had guaranteed payment of amounts due from the first and second defendants to the plaintiffs.

F The first and second defendants delivered a statement of defence. The plaintiffs sought to have it struck off as disclosing no reasonable defence and/or being frivolous and vexatious. Abdul Razak J. heard the application and dismissed it. He held that there were triable issues.

G In the meantime the plaintiffs obtained judgment in default against the third and the fourth defendants. That against the fourth was by consent set aside after which the plaintiffs took out 0.14 proceedings against the fourth defendant. The Senior Assistant Registrar who heard it gave summary judgment against the fourth defendant who has appealed. Pending the appeal, the fourth defendant applied for a stay of execution.

H Held, allowing the application: (1) in respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal;

I (2) in the instant case in the face of the view taken by Abdul Razak J. on the claim against the first and the second defendants and in the circumstances of the case, the fourth defendant has shown that there is every probability that the appeal may succeed.